Kilang Kelapa Sawit Selumpur Sdn Bhd (in liquidation) (receiver appointed) v Revenue Direction Palm Oil Mill (M) Sdn Bhd (formerly known as Revenue Direction Sdn Bhd)

HIGH COURT (SHAH ALAM) — COMPANIES (WINDING-UP) PETITION NO BA-28NCC-152–04 OF 2016
VAZEER ALAM J
7 NOVEMBER 2018

Companies and Corporations — Winding up — Petition — Respondent indebted to petitioner — Respondent failed to make payment — Petitioner filed petition pursuant to s 465(1)(e) read with s 466 of the Companies Act 2016 — Whether affidavit opposing petition filed by respondent valid — Whether purchaser of respondent's property could oppose petition — Whether purchaser was creditor or contributor with interest — Whether respondent unable to pay its debts — Whether it was just an equitable for respondent to be wound up — Companies Act 2016 ss 465(1)(e) & 466 — Companies (Winding-Up) Rules 1972 rr 28 & 30

The respondent had obtained a restraining order ('RO') under s 176(10) of the Companies Act 1965 which restrained any and all legal action being commenced or continued against the respondent for 90 days in order for the respondent to formulate a scheme of arrangement and compromise with its scheme creditors. It was undisputed that the respondent was indebted to the petitioner in the sum of RM3,871,520.64 as at 30 April 2016. The petitioner was voted in favour of the scheme of arrangement ('the SOA'). The SOA, inter alia, involved the sale and disposal of the respondent's properties to a company known as Palm Discovery Sdn Bhd ('the purchaser') vide a sale and purchase agreement dated 4 July 2016 ('the SPA') whereby the proceeds of the sale was to be paid to the scheme creditors who voted in favour of the SOA, including the petitioner. Problem arose when the SPA had not been completed and no payments were made to the petitioner in contradiction with the SOA. Consequently, the petitioner had served a statutory notice pursuant to s 465(1)(e) of the Companies Act 2016 ('the CA 2016'), read together with s 466(1)(a) or (c) thereof. The respondent did not challenge the statutory notice nor did the respondent make payment within 21 days which gave rise to the statutory presumption of insolvency under s 466 of the CA 2016. Subsequently, the petitioner proceeded to file this petition on 2 April 2018 pursuant to s 465(1)(e) of the CA 2016. The petition was fixed for hearing on 10 July 2018, but the respondent did not file any notice of intention to oppose the petition. However, on the eve of the hearing, the respondent appeared on the petition and filed an affidavit in opposition on 9 July 2018. The respondent

objected to the affidavit of opposition on the grounds that it contravened the provisions of r 30 of the Companies (Winding-Up) Rules 1972 ('the Rules'). During the hearing, the purchaser informed the court that they had filed notice of intention to oppose the petition, but the petitioner argued that: (a) the purchaser was not a creditor of the respondent; and (b) the notice of intention to appear was invalid as it did not comply with the requirements of r 28 of the Rules.

Held:

(1) The respondent's affidavit which was filed a day before the hearing of the petition could not be admitted as it contravened the mandatory requirement in r 30(1) of the Rules that any affidavit in opposition must be filed at least seven days before the hearing date. Hence, it was quite evident that the respondent had not validly filed affidavit opposing the petition, and the petition should be considered only on the cause papers filed by the petitioner (see para 14).

(2) The court's record showed that the notice of intention to appear on petition by the purchaser was filed on 9 July 2018 at 4.47pm and subsequently served on the petitioner. The service of the notice of intention on the petitioner's solicitors was invalid as it did not comply with the mandatory requirement of r 28 of the Rules that it be served by 12pm on the day prior to the hearing. Further, it was evident that other than the fact that Palm Discovery Sdn Bhd was the purchaser in the SPA, it did not have any other interest in the respondent. The court therefore concluded that the purchaser was not a creditor nor a contributory with an interest in law to oppose the petition (see para 15).

(3) Since the SOA had lapsed, and all the cause papers were in order, and the averment in the petition and the affidavit verifying petition were unrebutted, the court found that it ought to grant order in terms of the petition. The intention of the petitioner to wind up the respondent was also supported by counsel for a supporting creditor, Highland Palm Sdn Bhd, who was present in the court (see para 16).

(4) Having considered the totality of the evidence and the fact that the respondent had not filed any affidavit opposing the petition, the court found that the petitioner had made out a strong case for winding-up under s 465(1)(e) of the CA 2016, as the respondent was clearly unable to pay its debts and that it was just and equitable that the respondent be wound up. The court granted order in terms of prayers in paras 22(1), (2), (3) and (4) of the petition. The liquidator proposed by the petitioner, Mr Tan Chil Khin under prayer 22(2) was appointed as provisional liquidator. The cost of the petition was fixed at RM5,000 to be borne by the respondent (see para 17).

[Bahasa Malaysia summary

Responden telah memperoleh perintah penyekatan ('RO') di bawah s 176(10) Akta Syarikat 1965 yang menghalang mana-mana dan semua tindakan undang-undang dimulakan atau diteruskan terhadap responden selama 90 hari supaya responden membentuk skim penyusunan dan kompromi dengan skim pemiutang. Adalah tidak dinafikan bahawa responden berhutang dengan pempetisyen sebanyak RM3,871,520.64 pada 30 April 2016. Pempetisyen diundi memihak skim penyusunan ('SOA'). SOA, antara lain, melibatkan jualan dan pelupusan harta responden kepada sebuah syarikat yang dikenali sebagai Palm Discovery Sdn Bhd ('pembeli') melalui perjanjian jual beli yang bertarikh 4 Julai 2016 ('SPA') di mana hasil penjualan itu akan dibayar kepada pemiutang skim yang mengundi memihak SOA, termasuk pempetisyen. Masalah timbul apabila SPA belum selesai dan tiada pembayaran dibuat kepada pempetisyen yang bertentangan dengan SOA. Oleh itu, pempetisyen telah menyampaikan dengan notis statutori menurut s 465(1)(e) Akta Syarikat 2016 ('the CA 2016'), dibaca bersama dengan s 466(1)(a) atau (c). Responden tidak mencabar notis statutori juga tidak membuat bayaran dalam masa 21 hari yang menimbulkan anggapan statutori mengenai ketidaksolvenan di bawah s 466 CA 2016. Selanjutnya, pempetisyen mengemukakan petisyen ini pada 2 April 2018 menurut s 465(1)(e) CA 2016. Petisyen itu ditetapkan untuk pendengaran pada 10 Julai 2018, tetapi responden tidak memfailkan sebarang notis niat untuk menentang petisyen itu. Walau bagaimanapun, pada hari sebelum pendengaran, responden muncul dengan petisyen itu dan memfailkan afidavit menentang pada 9 Julai 2018. Responden membantah afidavit menentang atas alasan bahawa ia melanggar peruntukan k 30 Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah'). Semasa pendengaran, pembeli memaklumkan kepada mahkamah bahawa mereka telah memfailkan notis niat untuk menentang petisyen, tetapi pempetisyen berpendapat bahawa: (a) pembeli bukan pemiutang responden; dan (b) notis niat untuk hadir adalah tidak sah kerana ia tidak mematuhi kehendak k 28 Kaedah.

Diputuskan:

(1) Afidavit responden yang difailkan sehari sebelum pendengaran petisyen tidak dapat diterima kerana ia melanggar syarat mandatori dalam k 30(1) Kaedah bahawa sebarang afidavit menentang mesti difailkan sekurang-kurangnya tujuh hari sebelum tarikh pendengaran. Oleh itu, jelas bahawa responden tidak memfailkan afidavit menentang petisyen dengan betul, dan petisyen itu hanya perlu dipertimbangkan pada kertas kausa yang difailkan oleh pempetisyen (lihat perenggan 14).

(2) Rekod mahkamah menunjukkan bahawa notis niat untuk hadir atas petisyen oleh pembeli telah difailkan pada 9 Julai 2018 pada 4.47 petang dan seterusnya disampaikan kepada pempetisyen. Penyampaian notis

niat ke atas peguam pempetisyen adalah tidak sah kerana ia tidak mematuhi kehendak mandatori k 28 Kaedah yang perlu disampaikan pada pukul 12 tengahari pada hari sebelum pendengaran. Tambahan lagi, adalah jelas bahawa selain Palm Discovery Sdn Bhd adalah pembeli dalam SPA, ia tidak mempunyai kepentingan lain dalam responden. Oleh itu, mahkamah membuat kesimpulan bahawa pembeli adalah bukan pemiutang atau penyumbang dengan kepentingan undang-undang untuk menentang petisyen (lihat perenggan 15).

(3) Memandangkan SOA telah luput, dan semua kertas causa teratur, dan penegasan dalam petisyen dan afidavit yang mengesahkan petisyen tidak dipatahkan, mahkamah mendapati bahawa ia sepatutnya memberikan mengikut terma petisyen tersebut. Niat pempetisyen untuk menggulung responden juga disokong oleh penasihat untuk pemiutang sokongan, Highland Palm Sdn Bhd, yang hadir di mahkamah (lihat perenggan 16).

(4) Setelah mempertimbangkan keseluruhan bukti dan fakta bahawa responden tidak memfailkan afidavit menentang petisyen, mahkamah mendapati bahawa pempetisyen telah membuat satu kes yang kuat untuk penggulungan di bawah s 465(1)(e) CA 2016, kerana responden jelas tidak dapat membayar hutangnya dan ia adalah adil dan saksama bahawa responden digulung. Mahkamah memberikan perintah mengikut terma permohonan dalam perenggan 22(1), (2), (3) dan (4) petisyen. Pelikuidasi yang dicadangkan oleh pempetisyen, En Tan Chil Khin di bawah permohonan 22(2) telah dilantik sebagai pelikuidasi sementara. Kos petisyen ditetapkan pada RM5,000 untuk ditanggung oleh responden (lihat perenggan 17).]

Notes

For cases on petition, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 1801–1973.

Cases referred to

Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd [2008] 3 MLJ 334; [2008] 3 CLJ 317, CA (refd)

Crocuses & Daffodils (M) Sdn Bhd v Development and Commercial Bank Bhd [1997] 2 MLJ 756; [1997] 3 CLJ 485, CA (refd)

Dataprep (Malaysia) Sdn Bhd v Utas Lambang Sdn Bhd [2009] 7 CLJ 163, HC (refd)

The Ayer Molek Rubber Company Berhad v Mirra Sdn Bhd [2007] MLJU 704; [2008] 2 CLJ 459, CA (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016) s 176, 176(10)
Companies Act 2016 ss 465(1)(e), 466, 466(1)(a), (1)(c)

Companies (Winding-Up) Rules 1972 rr 28, 30, 30(1), 32

(Joshua & Assoc) for the appellant.
(Leong Kwong Wah) for the respondent.
(Go Tiong Siew & Assoc) for Palm Discovery Sdn Bhd.
(Law Office of Hann) for Higland Palm Produce Sdn Bhd.

Vazeer Alam J:

[1] The is a petition pursuant to ss 465(1)(e) read with ss 466(1)(a) or (1)(c) of the Companies Act 2016 to wind-up the respondent on grounds that it is just and equitable to do so as it is unable to pay its debts.

[2] It is undisputed that the respondent is indebted to the petitioner in the sum of RM3,871,520.64 as at 30 April 2016.

[3] On 20 January 2017, the respondent obtained a restraining order ('RO') pursuant to s 176(10) of the Companies Act 1965, from the High Court at Shah Alam vide Originating Summons No BA-24NCC-108–12 of 2016. The RO restrained any and all legal action being commenced or continued against the respondent for 90 days in order for the respondent to formulate a scheme of arrangement and compromise with its scheme creditors pursuant to the said s 176 of the Companies Act 1965.

[4] The respondent had acknowledged and admitted that it is indebted to the petitioner in the sum of RM3,871,520.64 as at 30 April 2016 in a document titled 'Explanatory Statement To The Scheme of Arrangement (Pursuant to Section 177 of the Companies Act 1965) in connection with the Scheme of Arrangement Under Section 176 of the Companies Act, 1765 Between Revenue Direction Palm Oil Mill Sdn Bhd (Company No 717067-K) (Incorporated in Malaysia under the Companies Act 1965) and its Scheme Creditors proposed by Revenue Direction Palm Oil Mill (M) Sdn Bhd (Company No 717067-K)' dated 14 February 2017 ('explanatory statement'), that was filed by the respondent by virtue of the RO. In that aforesaid explanatory statement, the petitioner was categorically stated as one of the scheme creditors of the respondent to whom the respondent is indebted to in the sum of RM3,871,520.64 as at 30 April 2016.

[5] At the court convened meeting of the scheme creditors held on 9 March 2017, the petitioner, as a recognised scheme creditor, was present and voted in favour of the aforesaid scheme of arrangement ('SOA').

[6] The SOA, amongst others, involves the sale and disposal of the respondent's several immovable properties to a company known as Palm

Discovery Sdn Bhd ('the purchaser') for a total consideration of RM50m vide a sale and purchase agreement dated 4 July 2016 ('SPA') and according to the SOA the net proceeds of the sale from the SPA was to be paid to its scheme creditors who voted in favour of the SOA, including the petitioner.

[7] The SOA as stated in the explanatory statement was approved by the High Court at Shah Alam by an order dated 11 May 2017. The firm of solicitors acting for the respondent in the SPA, Messrs Ong Kok Bin, vide letter dated 29 November 2017 informed the petitioner's solicitors, Messrs Leong Kwong Wah, that the extended completion date for the SPA is 9 February 2018. However, as at 9 February 2018, the SPA had not been completed, and no payments were made to the petitioner. Hence, the respondent had failed to adhere to the terms of the SOA as approved by the order of court dated 11 May 2017.

[8] By reason thereof, the petitioner humbly avers that the respondent was unable to settle its indebtedness to the petitioner. Thus, on 9 February 2018, the petitioner served on the respondent a Statutory Demand dated 9 February 2018 issued pursuant to s 465(1)(e) of the Companies Act 2016, read together with s 466(1)(a) or (1)(c) thereof, for payment of the respondent's indebtedness to the petitioner in the sum of RM3,871,520.64 as at 30 April 2016 ('statutory notice').

[9] The respondent did not challenge or dispute the petitioner's demand as contained in the said statutory notice nor did the respondent make payment of the sum of RM3,871,520.64 to the petitioner within 21 days of service of the said notice.

[10] The failure of the respondent to make payment of the debt claimed in the said notice within the 21 day's notice period gives rise to the statutory presumption of insolvency under s 466 of the Companies Act 2016 that reads:

> (1) A company shall be deemed to be unable to pay its debts if —
>
> (a) the company is indebted in a sum exceeding the amount as may be prescribed by the Minister and a creditor by assignment or otherwise has served a notice of demand, by himself or his agent, requiring the company to pay the sum due by leaving the notice at the registered office of the company, and the company has for twenty-one days after the service of the demand neglected to pay the sum or to secure or compound for it to the satisfaction of the creditor;

[11] The petitioner then proceeded to file this petition on 2 April 2018 pursuant to s 456(1)(e) of the Companies Act 2016, which reads:

> (1) The Court may order the winding up if —

(e) the company is unable to pay its debts;

[12] The petitioner had served the petition and all related cause papers on the respondent on 4 May 2018 and the affidavit of service has been filed. The petitioner had complied with all procedural requirements and the registrar's certificate was issued on 28 June 2018 as provided in r 32 of the Companies (Winding-Up) Rules 1972.

[13] The petition was fixed for hearing on 10 July 2018. The respondent did not file any notice of intention to oppose the petition. However, on the eve of the hearing, the respondent appeared on the petition through its solicitors, Messrs Joshua & Assocs, and filed an affidavit in opposition dated 9 July 2018.

[14] This affidavit in opposition was objected to by learned counsel for the petitioner on grounds that it contravened the provisions of r 30 of the Companies (Winding-Up) Rules 1972, that reads:

(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

In *Crocuses & Daffodils (M) Sdn Bhd v Development and Commercial Bank Bhd* [1997] 2 MLJ 756; [1997] 3 CLJ 485 Siti Norma Yaakob JCA (as she then was) said:

By their words and expression, r 30(1) is mandatory in nature and as such, the learned judge was correct when he refused to admit all four affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other.

As such I agree with the contention of learned counsel for the petitioner that the respondent's affidavit filed on 9 July 2017, ie a day before the hearing of the petition, cannot be admitted as it contravenes the mandatory requirement in r 30(1) of the Companies (Winding-Up) Rules 1972 that any affidavit in opposition must be filed at least seven days before the hearing date. Hence, it is quite evident that the respondent had not validly filed affidavit opposing the petition, and the petition should be considered only on the cause papers filed by the petitioner. See also *The Ayer Molek Rubber Company Berhad v Mirra Sdn Bhd* [2007] MLJU 704; [2008] 2 CLJ 459 (CA); *Dataprep (Malaysia) Sdn Bhd v Utas Lambang Sdn Bhd* [2009] 7 CLJ 163 (HC); *Anvest Corp Sdn Bhd v Wong Siew Choong Sdn Bhd* [2008] 3 MLJ 334; [2008] 3 CLJ 317 (CA).

[15] At the hearing of the petition, Palm Discovery Sdn Bhd, ie the

purchaser under SPA, sought to be heard via counsel. Counsel appearing for Palm Discovery Sdn Bhd informed the court that they had filed a notice of intention to oppose the petition and had faxed the same to the petitioner's solicitors the previous day. Counsel for the petitioner pointed out that, firstly Palm Discovery Sdn Bhd is not a creditor of the respondent, and secondly, that notice of intention to appear on the petition was also invalid as it did not comply with the requirements of r 28 of the Companies (Winding-Up) Rules 1972 that reads:

> (1) Every person who intends to appear on the hearing of a petition shall serve on the petitioner or his solicitor notice of his intention. The notice shall be signed by the person or by his solicitor and shall give the address of the person signing it and shall be served or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than 12.00 o'clock noon of the day previous to the day appointed for the hearing of the petition.
>
> (2) The notice may be in Form 8 with such variations as circumstances may require.
>
> (3) A person who has failed to comply with this rule shall not, without special leave of the Court, be allowed to appear on the hearing of the petition.

The court's record show that the notice of intention to appear on petition by Palm Discovery Sdn Bhd was filed on 9 July 2018 at 4.47pm and subsequently served on the petitioner. Hence, I agree with the submissions of counsel for the petitioner that the service of notice of intention on the petitioner's solicitors was invalid as it did not comply with the mandatory requirement of r 28 of the Companies (Winding-Up) Rules 1972 that it be served by 12 noon on the day prior to the hearing. Nevertheless, in the interest of justice I heard counsel for Palm Discovery Sdn Bhd on the nature of their opposition to the petition. It was evident that other then the fact that Palm Discovery Sdn Bhd is the purchaser in the SPA, it does not have any other interest in the respondent. Having heard counsel, I concluded that Palm Discovery Sdn Bhd was not a creditor nor a contributory with an interest in law to oppose the petition. If Palm Discovery Sdn Bhd was still desirous of purchasing those properties, it may negotiate with the liquidator.

[16] In the premise, since the SOA had lapsed, and all the cause papers were in order, and the averment in the petition and the affidavit verifying petition stands unrebutted, I find that the court ought to grant order in terms of the petition. The intention of the petitioner to wind up the respondent was also supported by counsel for a supporting creditor, Highland Palm Sdn Bhd, who was present in court.

[17] Having considered the totality of the evidence and the fact that the

respondent had not filed any affidavit opposing the petition, I find that the petitioner has made out a strong case for winding-up under s 456(1)(e) of the Companies Act, as the respondent is clearly unable to pay its debts and that it is just and equitable that the respondent be wound up. Wherefore, order in terms of prayers in paras 22(1), (2), (3) and (4) of the petition was granted. The liquidator proposed by the petitioner, Mr Tan Chil Khin under prayer 22(2) was appointed as provisional liquidator. The cost of the petition was fixed at RM5,000 to be borne by the respondent.

Order accordingly.

Reported by Dzulqarnain Ab Fatar